IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 277 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 Yes
3-5 No

BIMALSINGH DUGGAL

Versus

CENTRAL BANK OF INDIA

Appearance:
MR HN BRAHMBHATT for the Appellant
MR RK MISHRA for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE J.R.VORA

Date of decision: 29/03/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

Being aggrieved by the judgment and decree passed by the Civil Judge (S.D.), Gandhidham, in Special Civil Suit No. 341/95 dated 29.10.96, this first appeal has been filed by original defendant No. 2.

2. The facts giving rise to the present appeal, in a nutshell, are as under :

3. Respondent No. 1 is Central Bank of India. It had lent a sum of Rs. 1,52,000/- to respondent No. 2 for the purpose of purchase of a truck. The present appellant was a surety and had executed a deed of guarantee. As respondent No. 2 did not make payment of the amount due and payable by him to respondent No. 1 bank, respondent No. 1 bank filed Special Civil Suit No. 341/95 for the purpose of recovery of the amount, which was due and payable by the principal debtor, namely, Babulal M. Mehta, who is respondent No. 2 herein. The present appellant was a surety and therefore he was joined in the said suit as defendant No. 2. The said suit was decreed and being aggrieved by the judgment and decree, the surety, that is, original defendant No. 2, has approached this Court by way of this First Appeal.

4. Learned advocate Shri Brahmbhatt appearing for the appellant-surety has submitted that the judgment delivered by the trial court is improper for the reason that though the appellant-surety was discharged from his liability, the surety was also saddled with the liability, which the principal debtor, namely, defendant No. 2, had to discharge. It has been submitted by the learned advocate that the creditor bank had lent money for the purpose of purchase of the truck. The truck had been hypothecated in favour of the creditor bank. The creditor bank, namely, respondent No. 1, had permitted the principal debtor to dispose of the truck, but before disposal of the said truck, the surety had not been informed by the creditor bank and therefore the surety had been discharged from his liability. He has relied upon judgments delivered in the case of Gopal Chandra Bagaria v. State Bank of India and another, AIR 1994 Orissa 329, P. Janakiram Chetty v. Punjab National Bank Ltd. and another, AIR 1968 Mysore 56 and S. Perumal Reddiar v. Bank of Baroda and others, AIR 1981 Madras 180, to substantiate his submission that as the surety had not been informed before disposal of the truck, the surety had been absolved from his liability.

5. On the other hand, learned advocate Shri G.K. Patel appearing for respondent No. 1 bank has submitted that it was not necessary for the creditor bank to inform the surety before disposal of the truck for the reason that the sale proceeds of the truck were credited in the account of the principal debtor. No prejudice had been caused to the debtor or the surety when the truck which had been hypothecated was permitted to be sold by the creditor bank. It has been submitted by him that had the truck been not permitted to be sold, the value of the truck would have diminished by efflux of time and the amount of interest payable by the debtor would have gone up. So as to see that the liability of the debtor is substantially reduced, at the request of the principal debtor, the truck had been permitted to be sold and the entire sale proceeds had been credited in the account of the principal debtor. He has therefore submitted that no prejudice had been caused to the surety by virtue of the sale of the truck, which had been hypothecated in favour of the bank.

6. We have heard the learned advocates and have also perused the record and proceedings pertaining to the case. We have gone through the Deed of Guarantee, the statement of accounts and depositions of the witnesses. We have gone through the depositions of Rajendra S. Pandya (Ex. 55), an employee of the creditor bank, Shri Babulal M. Mehta (Ex. 56), respondent No. 2, who was the principal debtor and Shri Bimalsingh Duggal (Ex. 57) the surety, who is the present appellant.

7. Upon perusal of the relevant record and the depositions of the concerned parties, it is crystal clear that the appellant surety had signed the deed of guarantee. The surety has admitted his signature on the deed of guarantee, but he has submitted that, without reading the contents of the deed, he had put his signature. Such a statement made by the appellant cannot be believed for the reason that the appellant is a person who knows English. He has signed in English. He is a businessman. When he had put his signature on the deed of guarantee, the trial court rightly presumed that, only after full knowledge with regard to the contents of the deed, the appellant surety had executed the deed of guarantee.

8. Thus, it is not in dispute that the appellant had guaranteed the payment of the debt of the principal debtor. It could also not be disputed by the learned advocate appearing for the appellant surety that the

nature of liability of the surety is co-extensive with that of the principal debtor. The main submission which has been made by the learned advocate appearing for the appellant-surety is that the surety was not informed before the truck in question was sold. He could not show any evidence to make us believe that the truck in question was disposed of in pursuance of any fraud or at a throwaway price. In pursuance of the request made by the principal debtor-respondent No. 2, the bank had permitted the principal debtor to sell the truck so that the liability of the principal debtor as well as the surety can be reduced substantially. It is pertinent to note that the truck was purchased somewhere in 1981 and for the purpose of purchase of the truck a sum of Rs.1,52,000/- was lent by the creditor bank to the principal debtor. In pursuance of the request made by respondent No. 2, i.e., the principal debtor, the truck was permitted to be sold in 1994 for Rs. 70,000/- and the said amount was credited in the account of the principal debtor. It is not the case of the appellant surety that the sale proceeds were not credited in the account of the principal debtor. It is also not the case of the appellant surety that the truck in question had been disposed of at a lesser price or in violation of any of the terms and conditions on which the truck was hypothecated in favour of the creditor bank. In any case, the learned advocate appearing for the appellant could not show that any prejudice was caused to the surety because of the sale of the truck in question.

9. Provisions of sec. 139 of the Indian Contract Act, 1872, sets out the circumstances in which the surety is discharged. The said section reads as under :

"Discharge of surety by creditor's act or omission impairing surety's eventual remedy-- If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

10. Upon perusal of the said section, it is very clear that if the creditor does any act which is inconsistent with the rights of the surety and if on account of such an action any remedy which is available to the surety is impaired, the surety is discharged. According to the said section, for discharge of the surety, two conditions must be satisfied,

(i) the creditor must do an act which is inconsistent

with the rights of the surety or omits to do an act which his duty to the surety requires him to do, and

(ii) by virtue of the action or inaction of the creditor referred to hereinabove, the eventual remedy of the surety himself against the principal debtor is impaired.

11. Thus, the crucial factor in this section is that by virtue of an action or inaction of the creditor, the eventual remedy of the surety should be impaired. In other words, before the act of the creditor can operate as a discharge, it is necessary to look further and see whether by the act of the creditor, the eventual remedy of the surety against the principal debtor is impaired.

12. Coming to the facts of the present case, upon perusal of the evidence, there appears to be no action or inaction on the part of the creditor which would discharge the appellant surety from his liability. In the instant case, the truck which had been hypothecated had been disposed of and the said disposal shows commercial prudence not only of the principal debtor but also of the creditor bank. As stated hereinabove, if the truck had not been sold by the creditor at the request of the principal debtor, value of the truck would have been decreased and burden of interest would have increased and in that event liability of the principal debtor as well as of the surety would have been substantially increased. As stated hereinabove, the learned advocate could not show as to how his remedy against the principal debtor had been impaired by virtue of the sale of the truck in question. As a matter of fact, liability of the surety was not impaired but it was decreased on account of sale of the truck at the right time because if the truck had been sold afterwards, its value would have gone down and burden of interest would have gone up and in that event eventual liability of the surety would have gone up. Thus, in the instant case, the eventual remedy of the surety had not been impaired but his position had been improved due to sale of the truck.

13. As far as legal position in such a case is concerned, it has been held by the privy Council in the case of Goerge Henry Taylor and anr. v. Bank of New South Wales, (1886) 11 Appeal Cases 596, that when a sale is effected by the mortgagor with the previous consent of the mortgagee, in the due course of his management and in a manner contemplated by the mortgage deed, the liability of the surety is not affected.

14. So far as the judgments which have been cited by

the learned advocate are concerned, we are of the view that the said judgments do not help the appellant. So far as the judgment delivered in case of Gopal Chandra Bagaria (supra) is concerned, it pertains to negligence of the creditor. In the instant case no negligence has been shown by the creditor bank. In the instant case, the creditor bank has shown its commercial prudence by permitting sale of the truck by the principal debtor in accordance with the terms and conditions on which the amount was lent to the pricipal debtor and, therefore, in our opinion, the said judgment would not help the appellant.

15. So far as the judgment delivered in Janakiram Chetty (supra) is concerned, it pertains to a case where some prejudice had been caused to the creditor because of action or inaction of the creditor. In the instant case, as stated hereinabove, the learned advocate has failed to show as to how any prejudice had been caused to the appellant because of sale of the truck in question and, therefore, in our opinion, the said judgment would also not help the appellant.

16. Lastly, the learned advocate has relied upon the judgment delivered in the case of S. Perumal Reddiar (supra). The said judgment pertains to a case where some alteration was made in the guarantee deed. The facts of the present case are absolutely different and, therefore, the said judgment would also not help the appellant.

17. We have gone through the judgment and the reevant record but we do not find any illegality committed by the trial court. In our opinion, the trial court has rightly held the appellant surety liable for the amount which was to be paid by the principal debtor.

In the circumstances, the appeal fails. It is dismissed with no order as to costs. R&P to be returned to the trial court.

(A.R. Dave, J.)

(J.R. Vora, J.)

(hn)